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BOOK REVIEWS

AN IMPORTANT STUDY OF THE INTERSTATE COMMERCE COMMISSION

THE INTERSTATE COMMERCE COMMISSION — A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE. By *I. L. Sharfman*—Professor of Economics in the University of Michigan. Parts I and II. Published by The Commonwealth Fund, New York, 1931. Part I—\$3.50; Part II—\$4.50.

These two volumes are the first two instalments of a treatise, two other parts of which are to follow. Part One deals with the legislative history of the Interstate Commerce Act, Part Two with the jurisdiction of the Commission. We are told that the Third Part will be entitled: "The Character of the Commission's Activities," and will contain chapters on the extent of the Commission's tasks, on the valuation project, on control of organization and finance, and on rate regulation; the Fourth Part will deal with Organization and Procedure. But what we have before us constitutes by itself a most valuable contribution to the law of a great subject.

It is interesting to note the growth of a literature on Administrative Law, until relatively recently an unknown and nameless branch of jurisprudence, which represents quite a distinctive type of law-writing, and it is not the least significant thing about the present addition that its author is an economist. Tone and method of treatment may differ somewhat from PATTERSON'S INSURANCE COMMISSIONER and HENDERSON'S FEDERAL TRADE COMMISSION, but that difference certainly does not mean inferiority. Indeed, by reason of the greatness of its theme, Mr. Sharfman's is the most important of the three monographs.

We associate with the Interstate Commerce Commission the most conspicuous example of government regulation of business. Conditions rather than legislative foresight account for the development of this regulation. There was a new experiment in government; and not only was there doubt and hesitancy in embarking upon it, but progress while irresistible was piecemeal and unsystematic. The huge agglomeration of provisions which constitute the Interstate Commerce and the Transportation Acts, represents in form of drafting the old type of Congressional legislation, while in substance it incorporates almost every new device of regulatory power. To the student of legislation the mere text of the law has always been a rich source-material from which to illustrate the availability of various legislative expedients; he now finds the origins of this text, so far as they can be gathered from the history of the times, from judicial decisions, administrative reports, and legislative debates, set forth clearly and in abundant detail. This occupies the first volume of the treatise.

In its form the Interstate Commerce Act stands midway between the Sherman law which does not rely upon administrative intervention, and the Federal Trade Commission law which altogether depends upon such intervention. The Interstate Commerce Act has a number of direct prohibitions and requirements, but they are overshadowed by those which operate through administrative power, and it is a number of essential aspects of this power which Mr. Sharfman subjects in the second volume to a keen and thorough analysis. The three chapters of the volume discuss the scope of the Commission's jurisdiction as regards the various instrumentalities of transportation and transmission, its

relation to intrastate transportation and to state control of it, and what the author calls the exercise of administrative discretion. Under the latter head he undertakes to appraise the administrative process as represented by the Commission's action in relation to the legislative mandate and to judicial control. The first of the three chapters will mean most to those interested in transportation problems, the second to the constitutional lawyer, and the third to the student of administrative law.

The author's observations in analyzing the administrative process are carefully elaborated and well substantiated; they are always interesting and generally command assent. This is particularly true of the justification of the doctrine of primary jurisdiction (*Abilene* case) and of the only qualified acceptance of the doctrine of affirmative and negative orders (*Procter-Gamble* case). In connection with the former it might perhaps have been pointed out that the decisions recognizing the primary jurisdiction of the courts in the matter of car distribution are probably no longer applicable since car service has been brought under the jurisdiction of the Commission (p. 402-403). The conclusiveness of negative orders is perhaps treated with too much acquiescence. Mr. Sharfman questions it in part upon the ground that it discriminates against shippers in favor of carriers (p. 416). But it is also possible to look upon its operation in this respect as a desirable modification of the law of reparation, the equities of which are as doubtful as its foundation in English precedent. Perhaps this subject will receive further discussion in subsequent volumes. And the same hope may be expressed with reference to the discretionary aspects of the novel powers under the Transportation Act. It is not impossible that with regard to these powers the doctrine of negative orders will have to be abandoned; they appear not as yet to have been adequately tested, and they present some of the most perplexing problems of the exercise of discretion.

The constant emphasis upon the discretionary nature of the administrative process is not as helpful as the author seems to think. The legislature in making laws, a commission in applying indefinite statutes, and a court in finding and developing law, all exercise discretion, partly free and partly bound, but each differing in kind and in degree; and administrative discretion differs in different fields of its manifestation. What is the earmark of administrative discretion? — that it is respected by the courts. Nothing is therefore gained by saying that it is respected because it is discretion. It is doubtful whether the provinces of finality and of reviewability can be determined otherwise than empirically. So it is difficult to make definite statements as to the provinces of legislation and of administration. In so far as the administrative process is more free than the judicial process, it is also more political; and whether a strongly political determination, if necessary, had better come under the guise of administration or frankly as an expression of legislative power, is a question upon which there may well be a difference of opinion.

It is interesting to observe how the magnitude of the governmental set-up which is represented by the Interstate Commerce Commission has impressed itself upon the author's mind; a profound study of the work done has convinced him of its fundamental soundness and value, and we may note by contrast that some of the facile denunciations of administrative law in England are not backed by similarly thorough research. However, this reflection also suggests

itself: it is legitimate to argue that every sustained course of political development by the mere fact of its success carries its justification; in the face of such a development a certain futility attaches to counsels of perfection. Yet while some degree of justification and of justice in essentials may be assumed, it is also true that every such development has its defects, some avoidable, some unavoidable, some unavoidable only for the time being. Official comments, whether in the form of administrative reports or of judicial or quasi-judicial opinions, will incline to gloss over these defects; a critical estimate such as we have before us will of course be a more balanced performance; yet occasionally we feel that the author is somewhat under the spell of his subject, and are now and then moved to say: "persuasive, but not quite convincing." But this is only now and then, and only in connection with the admirable conclusions and summaries. The presentation of the substantiating material carries every impression of solidity and soundness.

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A VALUABLE HANDBOOK

VOLD ON SALES. (Hornbook Series) By *Lawrence Vold*. St. Paul: West Publishing Co. 1931. Pp. ix, 623. \$5.

Mr. Vold's book appeals to the reviewer as an excellent piece of work. The conventional "hand-book" type is encyclopaedic in form rather than discursive and Mr. Vold has followed convention in this respect. The amount of authority compiled is rather striking. A rough computation from the table of cases indicates that within his 500 pages the author has collected over 2,700 citations. Somewhere between a third and a half of his pagination is foot-notes. From this point of view, as a conveniently classified and indexed source of authority, the book should be distinctly useful.

One may go much further in commendation, however, in saying that Mr. Vold has not confined himself to mere hand-book statement of rule with citation of authority. The book is not, and does not purport to be, an analysis of the rationale of the various legal rules; neither does it delve into their historical backgrounds, nor discuss to any great extent their logical relationships and analogical bearings. Nevertheless, it contains a helpful amount of the author's own deductions and generalizations from his study of cases; conclusions as to the law not expressed in the decisions themselves. Thus, for example, in the sections on "sale or return," and "delivery on approval," Mr. Vold, having pointed out that the legal consequences of either transaction are relatively easy to determine once the character of the transaction itself is determined, discusses the indicative circumstances and ventures the cautious opinion that "it is probably correct to generalize, though of course the questions of fact may be close, that if by the terms of the bargain fairly construed lack of satisfaction by the recipient is what must be shown, the transaction is one of 'sale or return,' while if by the terms of the bargain fairly construed satisfaction by the recipient is what must be shown, the transaction is one of delivery on approval or trial." (p. 165.) Suggestions of this sort, from one who has himself studied widely into the decisions, are always helpful to anyone striving to predict how a case will be decided, or to influence the decision.